

IT 96-19

Tax Type: INCOME TAX

Issue: Income Earned In Illinois/Individual Residency

STATE OF ILLINOIS
DEPARTMENT OF REVENUE
ADMINISTRATIVE HEARINGS DIVISION
CHICAGO, ILLINOIS

THE DEPARTMENT OF REVENUE)
OF THE STATE OF ILLINOIS)

v.)

No.)

TAXPAYER,)

James P. Pieczonka)

Taxpayer(s))

Administrative Law Judge)

RECOMMENDATION FOR DISPOSITION

Synopsis:

This matter is before this administrative tribunal as the result of a timely Request for Hearing by TAXPAYER (hereinafter referred to as the "taxpayer") to a Notice of Deficiency (hereinafter referred to as the "Notice") issued to him on November 7, 1994. The basis of the Notice is the Illinois Department of Revenue's (hereinafter referred to as the "Department") determination that taxpayer had failed to file an Illinois Income Tax return for the tax year ended December 31, 1988. The Notice asserted a tax liability, as well as penalties pursuant to 35 ILCS 5/1001, 5/1005 and 5/804 for failure to file, failure to pay the entire tax liability by the due date, and failure to pay estimated tax, respectively.

In the taxpayer's Protest, he did not contest the Department's proposed tax assessment for 1988, however, he contested the Department's failure to give him a credit for Illinois taxes withheld by his employer in 1988. A hearing in this matter was held on May 19, 1995. The issues to be resolved are:

- (1). Whether the taxpayers failed to file an Illinois income tax return for the 1988 tax year?
- (2). Whether penalties should be assessed pursuant to 35 ILCS 5/1001, 5/1005 and 5/804?

Following the submission of all evidence and a review of the record, it is recommended that the Notice of Deficiency be upheld as to the taxes due, but taxpayer be given a credit for Illinois taxes withheld in the amount of \$262.00.

Findings of Fact:

1. For the subject taxable year, taxpayer did not file an IL-1040 return. Taxpayer was subsequently audited by the IRS and filed his 1040. (Dept. Ex. No. 3; Taxpayer Ex. No. 1)

2. The Department of Revenue received information of taxpayer's federal adjusted gross income and issued a Notice of Deficiency for the subject taxable year on November 7, 1994. (Dept. Ex. No. 2)

3. Taxpayers filed a timely Protest. (Dept. Ex. No. 3)

4. In his Protest, the taxpayer agreed with the Department's determination of taxes due, however, he contested the Department's failure to credit his return with Illinois taxes withheld by his employer, EMPLOYER in the amount of \$262.00. (Dept. Ex. No. 2) Taxpayer requested a copy of his 1988 W-2 from the Department on form IL-4852 since his employer was a defunct corporation. However, the Department did not respond to date.

5. Additionally, in his Protest, taxpayer submitted a check in the amount of \$258.00 on November 21, 1994, which represented the tax liability of \$435.00 less \$262.00 for Illinois taxes withheld (\$173.00) and \$85.00 as interest through 11/25/94. (Taxpayer Ex. No. 3)

6. At the hearing, taxpayer's CPA, CPA, testified that he calculated taxpayer's Illinois income from the federal return and arrived at a credit for Illinois taxes withheld from taxpayer's defunct employer in the amount of \$262.00 by applying the tax rate of 2.5% to taxpayers W-2 wages of \$10,493.00 since taxpayer's W-2 for 1988 was unobtainable.

Conclusions of Law:

All persons who either earn or receive income in or as a resident of the State of Illinois are subject to Illinois income tax. 35 ILCS 5/201(a) The taxpayer, as an Illinois resident who earned income in this state,

was accordingly subject to Illinois income tax and were required to timely pay and file a return under the Illinois Income Tax Act. (35 **ILCS** 5/101 *et seq.*)

The Notice of Deficiency is *prima facie* correct so long as its proposed adjustments meet some minimum standard of reasonableness. Vitale v. Illinois Department of Revenue, 118 Ill.App.2d 210 (3rd Dist. 1983). In order to overcome this *prima facie* correctness, the taxpayer must present competent evidence that the proposed adjustments are incorrect. Masini v. Department of Revenue, 60 Ill.App.3d 11 (1st Dist.1978). The taxpayer has partially met that burden in this case.

Taxpayer presented evidence, consisting of copies of his U.S. 1040 return, a request for substitute IL-W-2 form and credible testimony from his CPA that the Department did not give him credit for Illinois taxes withheld by his former employer during 1988. Taxpayer admits that he did not file an IL-1040 return with the State of Illinois for the tax year 1988 and he did agree with the Department's assessment of taxes provided a credit for withheld taxes in the amount of \$262.00 was allowed. Taxpayer presented evidence which was consistent, probable, and reasonable in view of books and records. Fillichio v. Department of Revenue, 15 Ill.2d 327 (1958) Accordingly, the taxpayer overcame the Department's *prima facie* case as to the total tax due and remitted the amount of taxes due less a credit for taxes withheld by his employer.

However, taxpayer did not rebut the Department's case as to the penalties due based upon the reduced amount of taxes due. The Notice proposed penalties pursuant to 35 **ILCS** 5/1001 , 5/1005 and 5/804 for failure to file, failure to pay the entire tax liability by the due date, and failure to pay estimated tax, respectively. Having determined that taxpayer paid income tax for the 1988 tax year with a credit for Illinois taxes withheld, the imposition of these penalties must be upheld provided that they are recalculated based upon the credit for withheld taxes in the amount of \$262.00.

It is my recommendation that this case be decided in favor of the taxpayer as to a credit for Illinois taxes withheld by his former employer in the amount of \$262.00, and for the Department in the amount of penalties to be recalculated given a credit for Illinois taxes withheld of \$262.00. Consequently, the Notice of Deficiency should be upheld in the recalculated amount of penalties due since the correct tax was remitted in the amount of \$173.00 on November 21, 1994.

May 24, 1995

James P. Pleczonka
Administrative Law Judge